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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 94-CA-001332-MR

DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS, INC., doing
business as THE TIMES JOURNAL - - - *Appellants*

v.

TERRILL FLANAGAN - - - - - - - - *Appellee*

Appeal From Russell Circuit Court
Honorable Eddie C. Lovelace, Judge
Civil Action No. 93-CI-000076

OPINION REVERSING—Entered June 19, 1996

BEFORE: HOWERTON, HUDDLESTON and MILLER, Judges.

HUDDLESTON, JUDGE. Russell County Judge/Executive Terril Flanagan brought this defamation action against *The Times Journal* based on three editorials the newspaper published criticizing his position on controversial county issues. A Russell circuit court jury returned a $1,000,000.00 verdict in Flanagan's favor. *The Times Journal*[1] appeals.[2]

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[1] Collectively, Russell County Newspapers, Inc., David J. Cazalet and Ed Cahill represent the interest of the newspaper. Cazalet is the newspaper's editor and publisher. Cahill is its managing editor.

[2] The Kentucky Press Association, Inc., together with fifty-seven other newspapers, submitted an Amicus Curiae brief urging reversal of the judgment.

Just as did the United States Supreme Court in the landmark First Amendment case, *New York Times* v. *Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686, 701 (1964), "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." We have a duty to conduct "an independent examination of the whole record . . . to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.*, 376 U.S. at 285, 84 S.Ct. at 729, 11 L.Ed.2d at 709. *See also Restatement (Second) of Torts* ˇ 580A cmt. g (1977). The Supreme Court of Kentucky has expressly recognized this unique standard of review for defamation cases. *Ball* v. *E.W. Scripps Co.*, Ky., 801 S.W.2d 684, 686, 689 (1990) *(citing New York* Times). When the question revolves around the underlying facts as opposed to the issue of actual malice, "appellate review still must be in terms of what the jury could find as the true facts and what the jury could reasonably infer from the testimony of witnesses when considered as a whole." *Id.* at 688 *(citing Harte-Hanks Communications,* Inc. *v. Connaughton,* 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)).

Flanagan was Russell County Judge/Executive at the time in question and, therefore, a public official.[3] The following elements must be present to establish defama-

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[3] Public officials are treated quite differently from private individuals in defamation cases., As the Supreme Court of Kentucky has stated, "[i]n the parlance of the horse industry, part of the turf of being a public official or public person is to be subject to public scrutiny." McCall *v. Courier-Journal and Louisville Times* Co., Ky., 623 S.W.2d 882 , 886 (1981). In 1966, the Court explained: "One who holds public office subjects his life to the closest scrutiny for the purpose of determining whether the rights of the public are safe in his hands." *Bell* v. *Courier-Journal and Louisville Times Co.*, Ky., 402 S.W.2d 84, 88 (1966).

tion of a public official: (1) A false[4] and defamatory[5] statement about the plaintiff;[6] (2) an unprivileged publication to a third party; (3) clear and convincing evidence of actual

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[4] "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." *Restatement (Second) of* Torts ˜ 581A (1977); *see also Bell*, 402 S.W.2d at 87 (indicating that truth is a complete defense to an action for libel in Kentucky). It is also clear that the publication need only be "substantially true." Bell, 402 S.W.2d at 87; *Pearce* v. *Courier-Journal & Louisville Times* Co., Ky.App., 683 S.W.2d 633 (1985).

[5] "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement (Second) of* Torts S 559 (1977); see *also Ball* v. *E.W. Scripps Co.*, Ky., 801 S.W.2d 684, 688 (1990). Furthermore, "[i]t is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication." *Restatement* ˜ 566 cmt. c.

[6] "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Yancey* v. *Hamilton*, Ky., 786 S.W.2d 854, 857 (1989) (quoting *Restatement* (Second) *of Torts* ˜ 566 (1977)). "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Restatement* ˜ 566 cmt. c. This form of pure opinion is absolutely privileged. *Yancey*, 786 S.W.2d at 857.

malice[7] on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[8]

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[7] The United States Supreme Court has defined "actual malice" as the making of a statement with knowledge that the statement is false and defamatory or with reckless disregard for whether it is false or not. *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). *See also Warford* v. *Lexington Herald Leader* Co., Ky., 789 S.W.2d 758, 771 (1990); McCall, 623 S.W.2d at 885; *Restatement* S 580A. Flanagan states in his brief that the question of whether the newspaper had knowledge that the statements were false and defamatory is not before the court. Therefore, the only issue is whether *The Times Journal* acted in reckless disregard for the truth or falsity of the statements made in its editorials. "Reckless disregard" exists when there is "a high degree of awareness of . . . probable falseness" or there are "serious doubts as to [its] truth." *Restatement* ˇ 580A cmt. d. "Actual malice" is used "with an esoteric rather than a literal meaning. Ill will or desire to injure the other party does not in itself have the effect of taking a communication outside the protection of the Constitution." Id. See also *Garrison* v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125, 135 (1964).

[8] The distinction between "libel per se" and "libel per quod" was explained in E.W. *Scripps Co.* v. *Cholmondelay*, Ky.App., 569 S.W.2d 700, 702 (1978):

> One interpretation of "per sell and "per quod" refers, respectively, to whether a defamatory statement is made on the face of the article, or whether extrinsic facts must be pleaded to explain that the statement is defamatory. If extrinsic facts must be supplied, then it is said innuendo must be pleaded, and the article is libelous per quod.

Flanagan must plead and prove special damages here because the editorials in question are, if anything, libel per quod. See *generally Shields* v. *Booles*, 238 Ky. 673, 38 S.W.2d 677, 681 (1931) (stating that "it cannot be said that voting for or against the repeal of a statute of itself raised an inference of libelous import").

It is also important to note that the plaintiff, Flanagan here, has the burden of proving the elements of the case as well as the burden of proving that the statements were outside the scope of constitutional protection with clear and convincing evidence.[9] *Restatement* ˇ 580A cmt. f. To decide this case, it is necessary for us to apply the law of defamation to each editorial separately.

MARCH 26, 1992 EDITORIAL:
"A DO-IT-YOURSELF BUDGET"

The first editorial that Flanagan cites as a basis for his defamation action was published on March 26, 1992. It was published in response to public controversy over the county budget. Flanagan challenged the following statements:

- County Judge-Executive Terril Flanagan has washed his hands of the county budget.
- Flanagan has presented his proposal, which is at least $250,000 over being balanced, to the magistrates.

The Supreme Court of Kentucky has held that alleged defamatory matter must be considered as a whole. *McCall* v. *Courier-Journal and Louisville Times Co.*, Ky., 623 S.W.2d 882, 884 (1981). Specifically, "[t]he alleged defamatory words must be measured by their natural and probable effect on the mind of the average lay reader . . . ." *Id.* We cannot overlook the fact that this and the other editorials that Flanagan claims to be defamatory were published in the "Editorials and Comments" section of the newspaper under the conspicuous "In Our Opinion" heading. Considering that the "Editorials and Comments" section has traditionally served as a forum for opinions of the newspaper and citizens, the average lay reader would un-

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[9] In Hardin v. *Savageau*, Ky., S.W.2d 1995 WL 561620, (1995) , the Supreme Court held that the jury is to decide whether the "clear and convincing evidence" burden has been met. Because the Hardin rule applies prospectively, it is not relevant to this case.

doubtedly interpret the statements as the opinion of the author.

A statement of opinion is "actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Yancey* v. *Hamilton*, Ky., 786 S.W.2d 854, 857 (1989) (quoting *Restatement* ˇ 566). "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Restatement* ˇ 566 cmt. c.

The statement alleging that Flanagan had "washed his hands" of the county budget is nothing more than a figurative phrase describing Flanagan's proposal. As recognized in *New York Times*, 376 U.S. at 271, 84 S.Ct. at 721, 11 L.Ed.2d at 701 *(quoting Cantwell* v. *Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed.2d 1213, 1221 (1940)):

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy.

The opinions expressed in the March 26, 1992, editorial were based upon allegedly well-known disclosed facts regarding the terms of the proposed county budget. Considering the editorial context and the underlying facts, we believe that it was unreasonable for the jury to find that the statement was defamatory.

Flanagan further claims that the statement that the budget was "$250,000 over being balanced" was false. A statement of fact is not false if it is "substantially true." *Bell v. Courier-Journal* and *Louisville Times, Co.*, Ky., 402 S.W.2d 84, 87 (1966); *Pearce* v. *Courier-Journal & Louisville* Times, *Co.* Ky.App., 683 S.W.2d 633 (1985). *See also*

Restatement § 581A. Truth is a complete defense to defamation claims in Kentucky. Bell, 402 S.W.2d at 87. Considering that Flanagan admitted that the budget he submitted projected expenditures of $250,000.00 for which there was no corresponding source of income, it is apparent that the statement complained of was substantially true.

Truth and falsity aside, however, we must point out that these statements are simply not defamatory. The newspaper's criticism of Flanagan's budget proposal cannot be said to harm the public official's reputation in a way that would lower him in the estimation of the community or to deter others from associating with him. *Restatement* ˇ 559. As the United States Supreme Court has said, "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions . . . . " *New York* Times, 376 U.S. at 269, 84 S.Ct. at 720, 11 L.Ed.2d at 700 *(quoting Bridges v.* California, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, 207 (1941)). Some even consider this type of public discourse to be a political duty. *Id.* The constitutional guarantees of free speech and press" require us to reverse the finding of defamation concerning the March 26, 1992, editorial.

DECEMBER 17, 1992 EDITORIAL:
"QUESTIONS FOR THE FISCAL COURT"

Flanagan challenges the following question asked in the December 17, 1992, editorial: "How could Herlen Lawless, Brad Redmon, Randall Hopper and Flanagan vote to spend $50,000 when no one even seemed to know from whom they were buying the insurance or what they were buying?" Flanagan claims that this question implies false facts. First, Flanagan says that he did not actually vote on the issue. Second, Flanagan claims that the issue voted on was whether to buy insurance, not whether to spend $50,000.00.

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[10] U.S. Const. amend. I; Ky. Const. §§ 1 and 8.

Although Flanagan did not actually vote on the insurance issue, the statement was not completely false[11] to say that he did when he brought the issue before the fiscal court, supported the purchase and admits that he would have voted in favor of the purchase had he voted. Flanagan testified that it was his practice to count the votes of the four other members of the fiscal court before voting himself. Since the vote on this issue was three-toone without Flanagan's vote, Flanagan decided that it was unnecessary for him to vote. Flanagan's vote, either for or against the purchase, would not have changed the outcome. Flanagan also testified that, as the presiding member of the fiscal court, it was his practice to count a person who does not cast a vote on an issue with the majority. By virtue of his own practice, Flanagan cannot escape being counted with the majority by refusing to vote on controversial issues. Accordingly, the statement was substantially if not precisely true.

Flanagan's claim that the vote was merely on whether to purchase insurance, not whether to spend $50,000.00, also lacks complete falsity considering that another member of the fiscal court reported the $50,000.00 price to the press. We will not label a statement as false based upon such minor inaccuracies in the rephrasing of the actual vote. Again, the statement was substantially true.

Regardless of truth or falsity, there is nothing defamatory about saying that a public official supported

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[11] *See Restatement* § 581A cmt. f ("slight inaccuracies of expression are immaterial" if the statement is "true in substance.").

thepurchase of health insurance for county employees.[12] The record simply fails to support a finding of defamation. Therefore, we must reverse the finding that the December 17, 1992, editorial was false and defamatory.

FEBRUARY 25, 1993 EDITORIAL: "MONTHLY SURCHARGE IS THE BEST WAY TO FUND DISPATCH AND 911"

The final basis for Flanagan's defamation claim is found in a February 25, 1993, editorial. Considering that Flanagan has admitted the truth of the statements contained therein,[13] we need not consider this editorial further. Truth is a complete defense to defamation claims in Kentucky. *Bell*, 402 S.W.2d at 87. Furthermore, we cannot ignore the fact that when Flanagan became Judge/Executive, he became a public official. By serving as a public official, Flanagan subjected "his life to the closest scrutiny for the purpose of determining whether the rights of the public are safe in his hands." *Id.* at 88. We reiterate:

> There is a well-known expression applied to those in public office, "If you can't stand the heat, you'd better stay out of the kitchen." Confrontation has a salutary effect and causes those in positions of public responsibility to practice thoughtfulness and wisdom in their utterances and carefully weigh their decisions. *Record-Times, Inc.* v. Town *of Wheatland*, 650 P.2d 297, 301 (Wyo. 1982).

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[12] "If the only question is whether the language is capable of bearing a particular meaning and whether that meaning is defamatory or not, that question is one of law . "*Restatement*" 580A cmt. d. While it is true that the issue of whether the defendant acted with knowledge or in reckless disregard of falsity is usually one of fact to be decided by a jury, the present case turns on the issue of whether there was a false and defamatory statement at all.

[13] Flanagan testified: "Well, I don't deny making the statement. But, once again, the courthouse is full of people, three-hour meeting, I had a 30-second spot. And who makes the editorial page? Old Terril again . . . ."

The record in this case fails to support the jury's finding that the three editorials cited as the bases for Flanagan's defamation claim contain false and defamatory statements. Considering that we have found that the first element of a valid defamation claim is not satisfied, it is unnecessary for us to consider whether Flanagan successfully proved the additional elements of a defamation case.[14] Nevertheless, we entertain serious doubt as to whether Flanagan established either actual malice or special damages. Actual malice does not exist unless the "defendant . . . entertained serious doubts as to the truth of his publication." *E.W. Scripps Co.* v. *Cholmondelay*, Ky.App., 569 S.W.2d 700, 704 (1978). In addition to the newspaper's managing editor's testimony that he believed the editorials to be true, Flanagan admitted the absence of actual malice in his opening statement.[15]

There is also a lack of evidentiary support for a finding of special damages. Proof of special damages requires evidence of actual economic loss. *Columbia Sussex* Corp., Inc. *v. Hay*, Ky.App. , 627 S.W.2d 270, 274 (1981). Proof of mental anguish[16] and a lost election,[17] the only harm Flanagan claims to have suffered, is not sufficient to establish special damages.

Since we reverse the judgment in favor of Flanagan, it is unnecessary that we consider other issues raised by the

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[14] The elements are set forth at the beginning of this opinion.

[15] Flanagan's attorney said: "*The Times Journal* evidently thought that all these things were true that they had said."

[16] Rich v. *Kentucky Country Day, Inc.*, Ky.App., 793 S.W.2d 832, 837 (1990) (special damages require more than "just mental pain, humiliation, disgrace or mortification").

[17] *Taylor* v. *Moseley*, 170 Ky. 592, 186 S.W. 634, 637 (1916) (special damages cannot be based upon an unfavorable election result).

newspaper, including its claim that punitive damages were improper under Ky. Rev. Stat. (KRS) 411.051.

The judgment is reversed.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

95-SC-1024-D
(94-CA-1332)

TERRILL FLANAGAN - - - - - - - - - *Movant*

v.

DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS, INC.,
d/b/a THE TIMES JOURNAL - - - - *Respondents*

Russell Circuit Court
No. 93-CI-76

OPINION DENYING DISCRETIONARY REVIEW
—Entered June 14, 1996

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED June 12, 1996.

/s/ Robert F Stephens
Chief Justice